



6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R03-OAR-2013-0113; FRL- 9790-9]

Approval and Promulgation of Air Quality Implementation Plans; West Virginia; Prevention of Significant Deterioration

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to disapprove a narrow portion of a State Implementation Plan (SIP) revision submitted by the State of West Virginia on August 31, 2011. EPA is proposing this action because a narrow portion of the submittal does not satisfy the Federal requirement for the inclusion of condensable emissions of particulate matter (condensables) within the definition of “regulated new source review (NSR) pollutant.” Additionally, because West Virginia’s August 31, 2011 SIP revision does not adequately account for condensable emissions within the definition of “regulated NSR pollutant,” EPA is also proposing to disapprove specific Prevention of Significant Deterioration (PSD) portions of related infrastructure submissions required by the Clean Air Act (CAA) to implement, maintain, and enforce the 1997 fine particulate matter (PM_{2.5}) and ozone National Ambient Air Quality Standards (NAAQS), the 2006 PM_{2.5} NAAQS, and the 2008 lead and ozone NAAQS. This action is being taken under the CAA.

DATES: Written comments must be received on or before [insert date 30 days from date of publication].

ADDRESSES: Submit your comments, identified by Docket ID Number **EPA-R03-OAR-2013-0113** by one of the following methods:

- A. www.regulations.gov. Follow the on-line instructions for submitting comments.
- B. E-mail: cox.kathleen@epa.gov.
- C. Mail: EPA-R03-OAR-2013-0113, Kathleen Cox, Associate Director, Office of Permits and Air Toxics, Mailcode 3AP10, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.
- D. Hand Delivery: At the previously-listed EPA Region III address. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. **EPA-R03-OAR-2013-0113**. EPA's policy is that all comments received will be included in the public docket without change, and may be made available online at www.regulations.gov, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through www.regulations.gov or e-mail. The www.regulations.gov website is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through www.regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special

characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the electronic docket are listed in the www.regulations.gov index.

Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form.

Publicly available docket materials are available either electronically in www.regulations.gov or in hard copy during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the West Virginia Department of Environmental Protection, Division of Air Quality, 601 57th Street SE, Charleston, West Virginia 25304.

FOR FURTHER INFORMATION CONTACT: Mike Gordon, (215) 814-2039, or by e-mail at gordon.mike@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Background

A. Federal Definition of “Regulated NSR Pollutant”

On May 16, 2008, EPA promulgated a rule to implement the 1997 PM_{2.5} NAAQS, including changes to the NSR program (the NSR PM_{2.5} Rule). *See* 73 FR 28321. The 2008 NSR PM_{2.5} Rule revised the NSR program requirements to establish the framework for implementing preconstruction permit review for the PM_{2.5} NAAQS in both attainment and nonattainment areas. Among other things, the 2008 NSR PM_{2.5} Rule required states to account for condensables in emissions of particulate matter (PM), PM less than or equal to ten micrometers in diameter

(PM₁₀), and PM_{2.5} no later than January 1, 2011. In an October 25, 2012 final rule (77 FR 65107), EPA clarified that condensable PM should be included as part of the emissions measurements only for regulation of PM_{2.5} and PM₁₀. The final rule removed the inadvertent requirement in the 2008 NSR PM_{2.5} Rule that measurements of condensable PM be included as part of the measurement and regulation of PM.

B. U.S. Court of Appeals' Decision in *Natural Resources Defense Council v. EPA*

On January 4, 2013, the U.S. Court of Appeals, in *Natural Resources Defense Council v. EPA*, No. 08-1250, 2013 WL 45653 (D.C. Cir., filed July 15, 2008) (consolidated with 09-1102, 11-1430), issued a judgment that remanded EPA's 2007 and 2008 rules implementing the 1997 PM_{2.5} NAAQS. The Court ordered the EPA to "repromulgate these rules pursuant to Subpart 4 consistent with this opinion." *Id.* at *8. Subpart 4 of Part D, Title 1 of the CAA establishes additional provisions for particulate matter nonattainment areas.

The 2008 implementation rule addressed by the court decision, "Implementation of New Source Review (NSR) Program for Particulate Matter Less Than 2.5 Micrometers (PM_{2.5})," 73 FR 28321 (May 16, 2008), promulgated NSR requirements for implementation of PM_{2.5} in both nonattainment areas (nonattainment NSR) and attainment/unclassifiable areas (PSD). As the requirements of Subpart 4 only pertain to nonattainment areas, EPA does not consider the portions of the 2008 rule that address requirements for PM_{2.5} attainment and unclassifiable areas to be affected by the Court's opinion. Moreover, EPA does not anticipate the need to revise any PSD requirements promulgated in the 2008 rule in order to comply with the Court's decision. Accordingly, EPA's narrow disapproval of West Virginia's infrastructure SIP as to elements (C),

(D)(i)(II), or (J) with respect to the PSD requirements promulgated by the 2008 implementation rule does not conflict with the Court's opinion.

The Court's decision with respect to the nonattainment NSR requirements promulgated by the 2008 implementation rule also does not affect EPA's current action on the related infrastructure submittals. EPA interprets the Act to exclude nonattainment area requirements, including requirements associated with a nonattainment NSR program, from infrastructure SIP submissions due three years after adoption or revision of a NAAQS. Instead, these elements are typically referred to as nonattainment SIP or attainment plan elements, which would be due by the dates statutorily prescribed under subpart 2 through 5 under part D, extending as far as 10 years following designations for some elements.

C. West Virginia's August 2011 SIP Submission

On August 31, 2011, the State of West Virginia through the West Virginia Department of Environmental Protection (WVDEP) submitted a formal revision to its SIP (the August 2011 SIP submission). The August 2011 SIP submission consisted of amendments to the PSD permitting regulations under West Virginia State Rule 45CSR14. On July 31, 2012 (77 FR 45302), EPA proposed full approval of West Virginia's August 2011 SIP submission, as well as the PSD portions of other related infrastructure submissions required by the CAA which are necessary to implement, maintain, and enforce the 1997 PM_{2.5} and ozone NAAQS, the 2006 PM_{2.5} NAAQS, and the 2008 lead and ozone NAAQS. During the public comment period, EPA received adverse comment on West Virginia State Rule 45CSR14 and the extent to which condensables were not included in the rule. The commenter stated that West Virginia's PSD regulations did not properly account for condensable emissions of PM. The inclusion of condensable emissions

of PM is required by the Federal counterpart language in 40 CFR 52.21 and 51.166 and the NSR PM_{2.5} Rule.

In light of this comment, in an October 17, 2012 final rule (77 FR 63736), EPA granted full approval of West Virginia's August 2011 SIP submission, as well as the PSD portions of other related infrastructure SIP submissions required by the CAA, with the exception of the narrow issue of the requirement to include condensables in the definition of "regulated NSR pollutant." In the October 17, 2012 final rule, EPA stated that West Virginia State Rule 45CSR14 would be reviewed to determine the extent to which condensables were addressed in the August 2011 SIP submission and that this issue would be addressed in a separate rulemaking action. *See* 77 FR 63736.

II. Summary of SIP Revision

As previously stated, on October 17, 2012, EPA granted full approval to the August 2011 SIP submission and PSD portions of other related infrastructure elements required by the CAA, with the exception of the narrow issue of the requirement to include condensables in the definition of "regulated NSR pollutant." Subsequently, EPA has reviewed the remaining portion of the West Virginia August 2011 SIP submission regarding the definition of "regulated NSR pollutant" and is proposing to determine that condensable emissions are omitted from the 45CSR14 definition of "regulated NSR pollutant." Therefore, this remaining portion of the August 2011 SIP submission does not satisfy the requirements of the corresponding Federal definition of "regulated NSR pollutant" and the NSR PM_{2.5} Rule. EPA is therefore proposing to disapprove this remaining narrow portion of the August 2011 SIP submission. Also, because condensable emissions are a requirement for a PSD program by CAA section 110(a)(2)(C), (D)(i)(II) and (J),

EPA is proposing to disapprove the narrow part of the PSD portions related to the definition of “regulated NSR pollutant” in other related West Virginia infrastructure SIP submissions required by the CAA which are necessary to implement, maintain, and enforce the 1997 PM_{2.5} and ozone NAAQS, the 2006 PM_{2.5} NAAQS, and the 2008 lead and ozone NAAQS.

III. Proposed Action

EPA is proposing to disapprove the narrow portion of West Virginia’s August 2011 SIP submission related to the failure to include condensables in the “regulated NSR pollutant” definition on which we took no action in the October 17, 2012 final rule. *See* 77 FR 63736. Specifically, EPA is proposing to disapprove a narrow portion of West Virginia’s August 2011 SIP submission because it does not satisfy the requirement that PM_{2.5} and PM₁₀ emissions shall include gaseous emissions from a source or activity which condense to form PM at ambient temperatures. Because these grounds for disapproval are narrow and extend only to the lack of condensable emissions within the definition of “regulated NSR pollutant,” this proposal does not alter EPA’s October 17, 2012 approval of the remaining portions of West Virginia’s August 2011 SIP submittal.

Additionally, EPA is proposing to disapprove specific portions of West Virginia’s infrastructure SIP submissions dated December 3, 2007, December 11, 2007, April 3, 2008, October 1, 2009, October 26, 2011, and February 17, 2012 (collectively, the West Virginia Infrastructure SIP Submissions) which address certain obligations set forth at CAA sections 110(a)(2)(C), (D)(i)(II) and (J) relating to the West Virginia PSD permit program. In the October 17, 2012 final rule, EPA granted full approval of the PSD portions of the West Virginia infrastructure SIP

submissions, with the exception of the narrow issue of the requirement to include condensables in the definition of “regulated NSR pollutant.” Because West Virginia’s definition of “regulated NSR pollutant” in 45CSR14 does not address condensables, EPA is proposing to determine that West Virginia’s infrastructure SIP submissions do not meet certain statutory and regulatory obligations relating to a PSD permit program set forth at CAA sections 110(a)(2)(C), (D)(i)(II) and (J) for the narrow issue of condensables as set forth in the table below. EPA is proposing to disapprove the narrow portion of the October 26, 2011 and February 17, 2012 infrastructure SIP submissions from West Virginia because West Virginia has not met its obligations relating to the PSD permit program pursuant to CAA section 110(a)(2)(C), (D)(i)(II), and (J) due to the failure to include condensables in the definition of “regulated NSR pollutant.” EPA is also proposing to disapprove the narrow portion of the December 3, 2007, December 11, 2007, April 3, 2008, and October 1, 2009 infrastructure SIP submissions from West Virginia because West Virginia has not met its obligations relating to the PSD permit program pursuant to CAA section 110(a)(2)(D)(i)(II) for the 1997 PM_{2.5} and ozone NAAQS and the 2006 PM_{2.5} NAAQS due to the failure to include condensables in the definition of “regulated NSR pollutant.” Specific infrastructure elements and submittal dates are listed in the following table.

Submittal(s) Dated	NAAQS	Infrastructure Element(s) Proposed to be Disapproved in this Action
December 11, 2007 April 3, 2008	1997 PM _{2.5}	110(a)(2)(D)(i)(II)
December 3, 2007 December 11, 2007	1997 ozone	110(a)(2)(D)(i)(II)
October 1, 2009	2006 PM _{2.5}	110(a)(2)(D)(i)(II)
October 26, 2011	2008 lead	110(a)(2)(D)(i)(II), (C), and (J)

February 17, 2012	2008 ozone	110(a)(2)(D)(i)(II), (C), and (J)
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Under CAA section 179(a), final disapproval of a submission that addresses a requirement of a Part D Plan (CAA sections 171- 193), or is required in response to a finding of substantial inadequacy as described in CAA section 110(k)(5) starts a sanction clock. The specific provisions in the submissions we are proposing to disapprove, due to the omission of condensables in the definition of “regulated NSR pollutant,” were not submitted by West Virginia to meet either of those requirements. Therefore, if EPA takes final action to disapprove these submissions, no sanctions under CAA section 179 will be triggered.

The full or partial disapproval of a SIP revision triggers the requirement under CAA section 110(c) that EPA promulgate a Federal Implementation Plan (FIP) no later than two years from the date of the disapproval unless the State corrects the deficiency, and the Administrator approves the plan or plan revision before the Administrator promulgates such FIP. From discussions with the State, EPA anticipates that WVDEP will make a submission rectifying the deficiency regarding condensables. Further, EPA anticipates acting on WVDEP’s submissions within the two year time frame prior to our FIP obligation on this very narrow issue. In the interim, EPA expects WVDEP to account for condensable emissions of PM consistent with Federal regulations for PSD permitting. EPA is soliciting public comments only on the issues discussed in this document. These comments will be considered before taking final action.

IV. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR

52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. In this case, EPA is proposing to disapprove a narrow portion of the West Virginia August 2011 SIP submittal and PSD portions of other related infrastructure submissions required by the CAA that do not meet Federal requirements. This proposed action:

- is not a “significant regulatory action” subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 et seq.);
- is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.);
- does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and

- does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this proposed rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the proposed rule to disapprove a narrow provision in the August 2011 SIP submission and to disapprove narrow portions related to the definition of “regulated NSR pollutant” in portions of the West Virginia infrastructure SIP submissions is not approved to apply in Indian country located in the state, and EPA notes that this action will not impose substantial direct costs on tribal governments or preempt tribal law.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Authority: 42 U.S.C. 7401 et seq.

Dated: March 6, 2013.

W. C. Early,
Acting Regional Administrator,
Region III.

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